No. 80-242

MICHAEL RODAK JR. CLERK

In the Supreme Court of the United States

OCTOBER TERM 1980

EDWARD HIDALGO, SECRETARY OF THE NAVY,
PETITIONER

v.

ALICE NAKSHIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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1. Respondent contends (Br. in Opp. 17-21) that suits against the sovereign for money damages are largely indistinguishable from suits at common law against private parties and that a right to jury trial should therefore be recognized in actions against the federal government under the Age Discrimination in Employment Act (ADEA).[1] But contrary to respondent's apparent assertion (Br. in Opp. 17-18, 20),

[1] The opinion of the court of appeals is now reported at 628 F.2d 59.

there is no Seventh Amendment right to a jury trial in suits against the government precisely because a cause of action against the government is dependent upon a waiver of sovereign immunity and is therefore not a suit at "common law" within the meaning of that Amendment. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572 (1962) (opinion of Harlan, J.); *Galloway* v. *United States*, 319 U.S. 372, 388–389 (1943); *McElrath* v. *United States*, 102 U.S. 426, 440 (1880). As a result, where Congress has consented to suit against the government, there is no right to trial by jury unless Congress affirmatively so provides. *Galloway* v. *United States*, *supra*, 319 U.S. at 388–389; Fed. R. Civ. P. 38(a).[2]

There is nothing in the ADEA affirmatively providing for jury trials in suits against the government. To the contrary, when Congress amended Section 7(c) of the ADEA in 1978 expressly to authorize jury trials in suits against private employers and state and local

[2] Respondent suggests (Br. in Opp. 20) that this reasoning is unsound because a suit for unpaid minimum wages or overtime compensation (presumably under the Fair Labor Standards Act, 29 U.S.C. 216) "was unheard of in the common law" and yet a Seventh Amendment right to a jury trial has been recognized in such suits against private parties. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 n.7 (1978). The implication appears to be that comparable suits against the government should likewise be tried to a jury. Respondent misapprehends the nature of the Seventh Amendment right. That right attaches in suits between private parties wherever the relief to be granted is legal in nature and is therefore similar to that available in a suit at common law, whether or not the particular cause of action actually was available at common law when the Seventh Amendment was adopted. *Id.* at 583; *Curtis* v. *Loether*, 415 U.S. 189, 193–196 (1974). The creation of new causes of action against private parties has no bearing on the availability of jury trials in suits against the government.

governments,[3] it did *not* amend Section 15(c) of the Act (29 U.S.C. 633a(c))—the separate section authorizing civil actions against the federal government[4]—to authorize jury trials in federal sector cases. This failure to provide for federal sector jury trials under the ADEA, at a time when Congress' attention was focused on the issue, conforms to the general rule that, absent legislation to the contrary, suits against the government are to the court, not a jury. See, *e.g.*, *Glidden Co.* v. *Zdanok*, *supra*, 370 U.S. at 572 (opinion of Harlan, J.), *Galloway* v. *United States*, *supra*, 319 U.S. at 388–389; 28 U.S.C. 2402. As Judge Tamm observed in dissent (Pet. App. 22a), "[t]he failure to adopt a parallel amendment indicates that Congress did not intend to extend its waiver of sovereign immunity to permit jury trials for federal employees."[5]

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[3] See 29 U.S.C. (Supp. II) 626(c)(2), as added by Pub. L. No. 95–256, Section 4(a), 92 Stat. 190.

[4] As we demonstrate in our petition (at 6–7), Section 15 contains wholly independent substantive and procedural provisions governing age discrimination in federal employment, and Section 15(f) precludes incorporation of the provisions of the FLSA upon which the Court relied in *Lorillard* v. *Pons*, *supra*. For this reason, respondent's reliance (Br. in Opp. 2–7) on *Lorillard*, which involved a suit against a private employer under Section 7(c), is misplaced.

[5] Respondent seeks (Br. in Opp. 25) to diminish the significance of Congress' failure to amend Section 15(c) to provide for jury trials when it amended Section 7(c) by arguing that there is no indication that Congress would have reached a different result with respect to suits against the government. But where the right to a jury trial depends on a statutory grant by Congress, mere speculation about what Congress *might* have done had it expressly addressed the issue cannot support a finding of an affirmative grant of that right. Moreover, the limited debate on the 1978 amendment to Section 7(c), like the decision in *Lorillard* that furnished a backdrop for that amendment, concerned the right to a jury trial in actions against *private* employers. It cannot be presumed that Congress would have

2. Respondent cites (Br. in Opp. 10–11, 27) *Harris* v. *U.S. Dep't of the Treasury*, 489 F. Supp. 476, 480 (N.D. Ill. 1980), in support of her argument that there is a right to jury trial in ADEA cases against the federal government. However, another judge in that same district, finding Judge Tamm's dissenting opinion in the instant case and the government's analysis more persuasive, has recently concluded that there is no right to a jury trial in federal sector ADEA cases. *Edmondson* v. *Simon*, No. 76 C 4591 (N.D. Ill. Aug. 26, 1980); see App., *infra*, 1a–6a. As we pointed out in our petition (at page 13), the court of appeals' decision in the instant case has already led to a number of jury trial demands in the district court in the District of Columbia, and will no doubt spur considerable litigation in other districts, as it already has done in the Northern District of Illinois. Prompt resolution of the important and unsettled jury trial question therefore is appropriate.

For the reasons stated above and in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1980

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reached the same result with respect to suits against the federal government, which raise "different concerns" (Pet. App. 23a; Tamm., J., dissenting). ADEA suits against private parties are patterned after FLSA procedures (29 U.S.C. 626(b)), under which a jury trial right against private employers has been recognized. *Lorillard* v. *Pons*, *supra*, 434 U.S. at 580 n.7. But ADEA suits against the *federal government* are patterned after suits under Title VII of the Civil Rights Act of 1964, in which there is no right to a jury trial even against private parties (see Pet. 7–8 n.5).

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 76 C 4591

VERA L. EDMONDSON, ETC., PLAINTIFF

v.

WILLIAM SIMON, ETC., ET AL., DEFENDANTS

Opinion and Order

Plaintiff has sued the Secretary of the Treasury and other federal government defendants, alleging violations of the Age Discrimination in Employment Act of 1967 (the "ADEA" or "Act"), Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, and has filed a jury demand under the ADEA count of her complaint. Defendants have moved to strike that jury demand. For the reasons stated in this opinion and order, defendants' motion is granted.

There is no provision of the Act that in terms grants a federal employee plaintiff the right to a jury trial; the Act is silent on that score. Each party's arguments are therefore necessarily based on inferences drawn from the inaction of Congress in dealing specifically with the jury trial issue as to federal employees. And each party seeks to rely, albeit in a different way, on the Supreme Court's decision in *Lorillard* v. *Pons*, 434 U.S. 575 (1978).

Lorillard involved, as to the employee of a *private* employer, the identical jury trial issue presented here. There too the statute was silent, and the Supreme Court implied the existence of a right to jury trial as a matter of statutory construction.

Essentially plaintiff's position is that *Lorillard* was predicated on the "significant indication" (434 U.S. at 580) of a congressional intention to parallel the Act with the Fair Labor Standards Act (the "FLSA"). In 1974 the FLSA was amended to allow suits against the United States. Although the FLSA itself contains no specific grant of a jury trial right to federal employees, plaintiff seeks to infer that the right to sue the United States under the 1974 amendment carried with it the established right (against other employers) to a jury trial. In turn plaintiff seeks to draw the inference from *Lorillard* that the parallel between the ADEA and the FLSA includes the inferential jury trial right.

Defendants draw an opposite set of inferences. Their basic premise is that the FLSA right to jury trial against non-governmental employees derives from the Seventh Amendment, which has no force against the federal government. From this they argue that, absent an explicit waiver of governmental immunity (not present in the ADEA), federal employees have no right to jury trial. *Lorillard's* implication of an ADEA right to jury trial, drawn from the FLSA cases dealing with employees in the private sector, should therefore not extend to federal governmental employees. Finally, they say, the 1978 amendment to the ADEA that codified and extended the *Lorillard* decision as to non-governmental employees impliedly negates any congressional intention to entitle federal governmental employees to jury trials.

Simply to state the parties' positions is to demonstrate that each has some strengths and some weaknesses—a not unexpected result where arguments seek to build inferences on other inferences. Only one Court of Appeals decision, *Nakshian* v. *Claytor*, 22 F.E.P. Cases 41 (D.C. Cir. 1980) and one District Court case, Judge Aspen's decision in *Harris* v. *United States Department of Treasury*, 79 C 0859, 22 F.E.P. Cases 592 (N.D. Ill. 1980), have dealt directly with the problem. Each upheld plaintiff's position here, *Nakshian* in a two-to-one decision of the Court of Appeals for the District of Columbia.

Though the issue is thus clearly a close one, it seems to the Court that the government and Judge Tamm's dissenting opinion in *Nakshian* have the better of the argument.

It was not until 1974 that the ADEA was made applicable to federal employees at all. That was done by enacting an entirely separate action (29 U.S.C. § 633a) covering employees of the federal government (29 U.S.C. §§623 ff. cover employees of private employers). Then after *Lorillard* Congress enacted a number of 1978 amendments to the ADEA. Section 626 was amended as to employees in the *private* sector to codify the *Lorillard* result and to extend jury trial to actions seeking liquidated damages and equitable relief (29 U.S.C. § 626(c)(2)). Section 633a was also amended as to federal employees—but *not* by the insertion of any jury trial provision.[1]

[1] One of the 1978 amendments relating to the federal sector (the addition of 29 U.S.C. § 633a(f)) provides:

> (f) Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section [the subsection creating the substantive non-age-discrimination

Section 626(b) of the Act provides:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title [all comprising part of the FLSA] and subsection (c) of this section.

As to non-governmental employees the teaching of *Lorillard* is that Congress was presumed to have enacted the ADEA with knowledge of the established construction of the FLSA granting the right to jury trials. But there is no such established construction of the FLSA as to *federal* employees (as already pointed out, the 1974 amendment extending FLSA coverage to governmental employees had no specific provision either granting or denying jury trials).

Because the Seventh Amendment's guaranty of jury trials does not extend to suits against the government (given the sovereign immunity that existed at common law when the Bill of Rights was adopted), it is necessary to find in the applicable statute a governmental consent not only to be sued but also to have the issues tried before a jury. When the government consents to be sued, "it is free to allow suit on whatever terms it chooses, and may grant or deny jury trial as it sees

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right] shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

Under the literal reading of that subsection, the jury trial section of the Act (29 U.S.C. 626(c)(2)) would be one of the provisions specifically made inapplicable to claims of federal governmental age discrimination. Perhaps because that argument could prove too much (possibly leading as well to depriving federal employees of the benefit of the attorneys' fees or liquidated damages provisions of the Act), the government does not seek to rely on Section 633a(f) in this case.

fit," 9 Wright & Miller, Federal Practice and Procedure § 2314, at 69; see 5 Moore's Federal Practice ¶ 38.31[2], at 236.

It has already been said that the 1974 amendments to the ADEA extending its coverage to federal employees contained no specific provision either way on the issue of jury trials. But that gap is more meaningful than mere silence. Congress had before it, but failed to elect, the available alternative of enacting proposed legislation that would clearly have resolved the issue in favor of jury trials.[2] Instead Congress adopted wholly separate provisions for federal employees. In this Court's view Congress' action negates any inference "by fair implication" that the 1974 amendments granted such employees a right to jury trial. Congress may have desired to extend equivalent *substantive* protection against age discrimination to federal employees, but it does not follow that it intended that the *procedures* be identical in all respects to those for employees in the private sector.

There is even more compelling congressional action — and inaction—that negates any implication of the right to jury trial. When the post-*Lorillard* amendments were adopted in 1978, Congress specifically con-

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[2] Senator Bentsen had originally introduced S. 3318, 92d Cong. 2d Sess., 118 Cong. Rec. 7745 (1972), which would have extended the ADEA to federal employees by amending the definition of "employer" in 29 U.S.C. § 630(b) to include the federal government. Had that provision been adopted, all procedural aspects of the Act, including the right to jury trials, would have extended equally to federal employees and to employees in the private sector; but the amendment was *not* adopted in that form. Later in the same term Senator Bentsen instead introduced the amendments that, as the 1974 amendments to the ADEA ultimately did, established a *separate* section with special procedures dealing with governmental age discrimination.

sidered the question of jury trials and amended *only* the private sector sections of the Act to codify and extend *Lorillard*. It did not choose to amend the federal employees section, Section 633a, to provide a comparable jury trial right, even though it contemporaneously amended that section in other respects. In this Court's view, Judge Tamm drew the correct inference when he said in dissent, *Nakshian* v. *Claytor*, 22 F.E.P. Cases at 48:

> The failure to adopt a parallel amendment indicates that Congress did not intend to extend its waiver of sovereign immunity to permit jury trials for federal employees.

This Court also finds persuasive Judge Tamm's reasoning in rejecting the other arguments adduced by plaintiff and by the majority opinion of his brethren in support of a jury trial. *Id.* at 48–49.

Finally, the doctrine of governmental immunity cannot be ignored. True enough, it has been deprived of much of its common law force, but always by *statutory* changes and not by judicial legislation. Absent a clear showing of congressional intent, certainly the doctrine retains enough vitality to overcome an attenuated argument like that proffered by plaintiff, based on a presumed intention grounded on an inference once removed.

For the reasons stated in this opinion, defendants motion to strike plaintiff's jury demand in Count II of the complaint is hereby granted.

/s/ _____
MILTON I. SHADUR
United States District Judge

Date: August 26, 1980

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